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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1903.

Commercial National Bank,
Plaintiff in Error,
v.
Henry Weinhard.
No. 109

Commercial National Bank,
Plaintiff in Error,
v.
George H. Williams,
No. 110.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

BRIEF OF DEFENDANTS IN ERROR.

GEO. H. WILLIAMS and GEO. H DURHAM,
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STATEMENT.

These actions were brought by George H. Williams and Henry Weinhard against the defendant to recover the value of stock which plaintiffs held as stockholders in the Commercial National Bank of Portland. Plaintiff Williams owning sixty shares of the par value of $6,000, and Plaintiff Weinhard owning one hundred shares at the par value of $10,000. The defendant is a national bank, organized under the Act of Congress known as the National Banking Act. A brief statement is as follows: The defendant, a national bank and a going concern, had been in business for a long time prior to 1894. During the panic of 1893 the bank suspended, but soon reopened its doors. In February, 1894, Wells, Fargo & Co. purchased a majority of the stock and thereby became the controlling stockholder. Subsequently to purchasing this stock, to-wit: March 14, 1894, the capital stock of the bank was increased from $250,000 to $500,000. The bank continued doing business until October 5, 1896, when the Board of Directors of the defendam bank passed a resolution requesting the Comptroller of the Currency to make an assessment on the bank stock of 50 per cent, or $250,000. At that time the directors of the bank were J. J. Valentine, president of Wells, Fargo & Co.; Homer S. King, cashier of Wells, Fargo & Co.; R. M. Dooley, sent from California by Wells, Fargo & Co. to oversee this bank; Eugene Shelby, managing agent of Wells, Fargo & Co., Portland; Richard Koehler, of the Southern Pacific Co. All of whom, except Mr. Valentine, held stock transferred to them by Wells, Fargo & Co. in order to qualify them as directors (see Reply of Defendant Williams, pp. 9-10). The other directors being W. M. Jack, John McCracken, H. C. Wortman and R. L. Durham, and plaintiffs claim that this assess-

ment was made at the instance and request of Wells, Fargo & Co., and for the sole purpose of freezing out the minority stockholders of defendant association. The Comptroller of the Currency, as plaintiffs allege, in compliance with this request, gave notice to the defendant bank, under section 5205 Revised Statutes of U. S., requiring the defendant association to make an assessment of 50 per cent upon the stock or to go into liquidation.

As soon as this notice from the Comptroller was received, this same Board of Directors, without calling a meeting of the stockholders, or otherwise, undertook and did, assess the stock of the bank $50.00 per share; and afterwards on May 5th, 1897, the stock of these plaintiffs was sold at public auction and purchased by Wells, Fargo & Co. or their representatives for the amount of the assessment, to-wit: $50 per share, which money was paid into the bank as a result of said sale.

The answer of the defendant admits that the assessment was made by the Board of Directors without consulting the shareholders, and at page 19 of the Abstract is the following allegation in the Weinhard answer, which allegation is also in the Williams answer, to-wit:

> "That in pursuance of said resolution the plaintiff's said 100 shares of the capital stock of the defendant were sold at public auction on the 5th day of May, 1897, at 3:30 P. M., at the banking house of the defendant in the City of Portland, State of Oregon; that at said sale the defendant received for the said 100 shares of stock the sum of $5,000.00 and no more, and that the whole number of said 100 shares of stock was the least amount of the said 100 shares of stock which would make the amount of the said assessment thereon."

The case was tried to the Court without the intervention of a jury and upon the trial the Court found the value of the shares of the stock at the time of the conversion to be $30.00 per share, and judgment was rendered in the Williams case for the sum of $1,800, and in the Weinhard case for the sum of $3,000.

POINTS AND AUTHORITIES.

I.

A corporation can only be created by the sovereign power of the State, and in the creation of a corporation, such as the defendant herein, the government grants to it certain powers which is a part of the State's sovereignty. When these powers are granted, until revoked, the corporation may exercise the powers granted.

Thompson on Corporations, Vol. 1, Sec. 35.

Bank vs. Earl, 38 U. S., 517.

II.

But it is an elementary principle that all grants of sovereignty to a corporation, all delegation of power, which is to be exercised under such a grant, must be strictly construed, and to this end, two things stand out as cardinal principles, namely: (a) That a corporation can only do those acts which are delegated and prescribed in the grant, or to state it in other language, its powers are measured strictly by its charter and all powers not specially granted by the charter are excluded. (b) It is a fundamental principle that the powers delegated to a corporation must be ex-

ercised by the agent or agency named in the grant. Or, in other words, the corporation can only act through such officers or agents as the grant or charter proscribes or designates.

Bank vs. Earl, 38 U. S., 517.

Bank vs. Deveaux, 5 Cranch, 61.

III.

When the powers of the corporation are challenged there is primarily no distinction between the exercise of the power granted and the manner or agency by which said power is exercised. That is to say, it is as valid an objection to the acts of a corporation to say that the acts have not been performed by the agents or officers named in the charter, as to say that the act is not within the powers granted by the charter, which is merely another way of saying that when the acts of a corporation are challenged, it must not only appear that the corporation had the power to do the act, but the act itself must have been done in the manner and through the officers named in the charter or grant of power.

Bank vs. Earl, 38 U. S., 517.

IV.

While directors may, as a general rule, exercise the ordinary powers of the corporation, yet all extraordinary powers as contra-distinguished from the ordinary powers of the corporation must be exercised by the shareholders alone.

Morse on Banking, Sec. 127.

Ry. vs. Allerton, 18 Wall, 233.

Ry. vs. Ry., 136 U. S., 305.

Boone on Banking, Secs. 83-84-197.

Thompson on Corporations, Secs. 3977-8-2076-3979.

Brown vs. Bradford, 103 Iowa, 378.

Lively vs. Omaha Hotel Co., 5 Neb., 74.

Boone on Banking, Secs. 83-84-197.

V.

The directors can not give away the funds of the bank without authority from the shareholders.

Boone on Corporations, Sec. 83.

Morse on Banking, Sec. 127.

Holder vs. Ry., 71 Ill., 106.

Bradford Ry. vs. Bouser, 48 Pa. St., 209.

VI.

While the directors have full power, control, and charge of the funds of the corporation, and for this reason may make an assignment for the benefit of creditors, still the directors have no power to create a fund, that being the duty of the stockholders, because, if the directors could either enlarge or diminish the fund of the corporation they could thereby change the status of the stockholder and place his stock upon a different basis than that assumed by him when he made his subscription.

2 Thompson on Corporations, Sec. 2076.

VII.

Where the legislature gives power to raise a fund in addition to the capital stock by assessment on the stockholders, the directors can not levy such an assessment without authority from the shareholders.

Marlborough Mfg. Co. vs. Smith, 2 Conn., 579.

VIII.

It is essential that the terms "call" and "assessment" should not be used as synonomous terms. A "call" is for an amount due upon

a subscription to stock, but an "assessment" is an amount levied upon a stockholder after his stock has been fully paid up.

23 Ency. of Law, 803 (1st Ed.).

IX.

It is an elementary principle of law that when one becomes a stockholder of a corporation that his relation to the corporation is that of a contract and if as above stated the directors could raise a fund and change the status of this contract without the consent of the stockholder, it would be giving a power to the Board of Directors which has been denied to the law-making power. It would allow the Board of Directors to change the contractual relations of the stockholder to the corporation.

U. S. vs. Knox, 102 U. S., 422.

X.

It has been held that a board of directors has no authority to pass a by-law providing that a person who transfers his stock shall cease to be a member of the corporation.

Commonwealth vs. Gill, 3 Whart. (Pa.) 228.

XI.

It is also held that a board of directors invested with "all corporate powers" has no authority to accept for the corporation an amendment of its charter enlarging the powers of the corporation.

Venner vs. Atchison Ry. Co., 28 Fed., 581.

Ill. Ry. vs. Zimmer, 20 Ill., 654.

Hope Ins. Co. vs. Beekman, 47 Mo., 93.

Commonwealth vs. Cullen, 13 Pa. St., 450.

XII.

Nor have the directors of a railway any authority without the

consent of the shareholders to appropriate money of the company to build a passenger depot in a foreign state to that in which it was created and to which its lines did not extend.

Nashua Ry. vs. Boston Ry., 136 U. S., 356.

XIII.

When the Comptroller of the Currency gives notice to a bank, under Section 5205 Revised Statutes U. S., requiring the bank to make an assessment to repair its stock, the notice is alternative and must require the association to either make an assessment or go into liquidation within three months after receiving notice from the Comptroller. This notice therefore ends the life of the corporation by limitation, unless a new fund is created by assessment on the shareholders. This limitation of the existence of the bank as a corporation is a part of its charter, and it ceases to be a body corporate for the purpose of transacting business under its charter, unless a new fund is created by the shareholders, equal to the amount stated in the notice; which may be 100 per cent or a fund equal to the amount originally necessary to start the bank. Manifestly the creating of this new fund to give new life to a bank is as great a power as to create the bank in the first instance.

Hulitt vs. Bell, 85 Fed., 98.

Delano vs. Butler, 118 U. S., 634.

XIV.

When this notice is given, the corporation ceases to exist as a bank after three months, but the stockholders may extend the life of the corporation by levying and paying the assessment on the stock, but this is clearly an act for the stockholders, and does not in any sense come within the ordinary affairs of the bank, which the directors are authorized to conduct and control.

Delano vs. Butler, 118 U. S., 634.

Where words are used in a statute and given a meaning, it will be presumed that they have the same meaning at all times subsequently used.

Factors and Traders Ins. Co, vs. New Harbor Protection Co., 37 La. An., 233.

Reiche vs. Smythe, 13 Wall, 162.

XV.

Revised Statutes U. S. 5133 provides "associations for carrying on the business of banking under this title may be formed by any number of natural persons, not less in any case than five." Under the above statute only natural persons in contra-distinction to corporations or artificial persons can form a national bank. Or, as the term is used in the statute, an "association."

XVI.

The word "association" as used in the National Banking Act, is defined therein to mean shareholders, and whenever the word "association" is referred to in the act it refers to the shareholders. And when any act is required to be done by the "association" it refers to the act of the shareholders alone, unless the statute expressly or by implication provides that some other officer or officers are specially designated to perform the act.

Rev. St. U. S., Secs. 5133-5134-5136-5157.

XVII.

Under Section 5205, the Board of Directors has no authority to levy an assessment upon the stock of the shareholders. When a notice has been received from the Comptroller of the Currency that the stock is impaired it is the duty of the shareholders to decide whether an assessment shall be made upon the shareholders or

whether the bank shall go into liquidation; this is a matter solely for the shareholders and not for the directors.

Hulitt vs. Bell, 85 Fed., 98.

Bank vs. Earle, 38 U. S., 517.

Ex parte, Winsor, 30 Fed. Cases, p. 317, No. 17, 884.

Delano vs. Butler, 118 U. S., 634.

Eidman vs. Bowman, 58 Ill., 438.

Marlbridge vs. Smith, 2 Conn., 579.

Gray vs. Portland Bank, 3 Mass., 634.

XIX.

So where a statute provides "if at any time the capital stock paid into said corporation shall be impaired, by losses or otherwise, the directors shall forthwith repair the same by assessment," held, that by this statute a personal liability is not imposed upon the stockholders, and that they can not be assessed for the purpose of paying the creditors; that the purpose of said provision was rather to prevent the continuance of business with impaired capital.

Dewey vs. Trust Co., 57 Vt., 327.

Waterman on Corporations, Vol. 2, Sec. 119, pp. 92-95.

XX.

The distinction between an assessment under Secs. 5151 and 5205 should be kept distinctly in mind. An assessment under 5151 is for the benefit of creditors and affects the relation between third persons and the bank, while the assessment under 5205 is not for the beneefit of creditors, it is merely a relation between the stockholder and the corporation for the purpose of repairing the capital stock. When an assessment is for the benefit of creditors or third parties, it is made by the Comptroller alone, but where it is

made to repair the capital stock, it is made by the association. The only office of the Comptroller in this respect is merely a negative one, which says to the bank, your assets are sufficient to pay your creditors, but you cannot continue business with impaired capital stock.

Delano vs. Butler, 118 U. S., 634.

XXI.

The mere fact that the assessment is necessary to repair the capital as contemplated under Section 5205, does not carry with it the presumption that the bank is not able to pay its depositors and other liabilities to third person. The presumption is the other way. It is presumed that the assets of the bank will pay its debts, and for that reason the statute provides that in case the assessment is not made within three months after notice, a receiver will be appointed and the assets delivered to the creditors of the bank and the surplus to the stockholders, so that when an assessment is called for under Section 5205 it is not for the benefit of the creditors of the bank, but merely for the purpose of keeping the bank in existence.

Dewey vs. Trust Co., 57 Vt., 327.

XXII.

The object of Section 5205 is to create new capital, not in the interests of the creditors of the bank, but merely to affect its status as a going concern. The raising of this new capital is, in no respect, a part of the ordinary affairs of the bank under the control of the directors. It affects what are called "constituent matters which demand the authorization of the stockholders" in contradistinction to the "business affairs of the corporation."

Wells vs. Green Bay etc. Co., 90 Wis., 422 S. C., 64 N. W. Rep., 69.

Re Sovereign Life Ass. Co. (1893), 3 Ch. 279, 287.

XXIII.

It is a rule as heretofore stated, that all grants of power to a corporation must be strictly construed. This is further limited by the rule that whatever presumptions may exist as to the power of the corporation to act where it relates to third persons dealing with the corporation, or where it is for the benefit of the creditors of the corporation, no latitude or presumptions are to be indulged in where the act relates solely to the relations between the corporation and the stockholder, for when a corporation by any act undertakes to affect the status of the shareholders, it devolves upon the corporation to act only when it has express or delegated powers, which must be free from ambiguity. This rule results from the fact that the shareholder's relation to the corporation is that of a contract, affecting his property rights, which can not be impaired without the consent of the shareholder.

Waterman on Corporations, Vol. 2, pp. 92-95.

Ireland vs. Turnpike Co., 19 Ohio St., 369.

Thompson on Corporations, Sec. 5161.

XXIV.

When the stock of a national bank, which is admitted to have been fully paid up, is wrongfully converted, the presumption is that the stock is worth at least its face value and *prima facie* the plaintiff would be entitled to recover that amount. The claim of appellant that plaintiff should have been non-suited because no proof was introduced, is not well taken, for the following reasons: First, it is admitted in the answer that the bank put this stock up at public auction, and it was sold for $50.00 cash per share, which money the bank received, and it is submitted that in an action for

the conversion of property where it is sold by the defendant at public auction, and the defendant admits that it has received the price paid therefore, at the sale, it is not competent for the defendant to claim that the property is not worth the price for which it is sold; and as in this case these shares sold for $50.00 per share, the defendant was liable for that amount without proof, aside from the presumption that the stock was worth its face value. The fact that the Court upon the trial found the value of the stock to be $30.00 per share, $20.00 less than the defendant admitted it had received therefor, is not an error of which appellant can take advantage on appeal.

Sedg. on Damages (8th ed.), Sec. 495.

McMann vs. Duffy, 36 Oregon, 150.

Budd vs. St. Ry., 15 Or., 413.

Evans vs. Koons, 10 Ind. App., 603.

Alderman vs. Cox, 74 Mo., 78.

Foster vs. Meyers, 12 Fed., 842.

XXV.

Second: In order to preserve any question of error, appellant should have relied upon its motion for a non-suit. Having failed to do so, and entered upon its proof as to the value of the stock it was the duty of the Court to find the value regardless of the motion for a non-suit. The appellant by entering upon its proof as to the value of said stock waived any error on its motion for a non-suit.

Bennett vs. N. P. Co., 12 Oregon, 49.

ARGUMENT.

This is an action for conversion. The respondents allege that they were stockholders in the Commercial National Bank. That an assessment was called by the Comptroller of the Curreucy under Revised Statutes, Section 5205. That the appellant through its Board of Directors made an assessment without consulting the stockholders, and under that assessment proceeded to advertise and sell the stock of respondents. The question for the Court to determine, therefore, is, whether or not the directors of a national bank have power under the Act of Congress creating national banks, to levy an assessment upon the stock of the shareholders under the section above quoted. Appellant in its brief has discussed the powers of directors generally with reference to corporations, and while the decisions of the Courts construing various acts creating corporations, may be an aid in construing any given legislative act, still it is important to keep in mind the fact that a corporation has not what is known as a natural birth. It is not like a plant, it has no attributes that are affected by climate or soil. A corporation is a thing that is created by law, and when its acts are challenged, its powers must be measured by the legislative grant creating the corporation, or, as is generally termed, its charter. What a corporation may do; by whom it may be done, are questions that must be answered by looking into the legislative grant which gives the corporation life. For example, in Utah a board of directors may levy an assessment to pay the debts of the corporation because the law creating corporations at Section 2374, Laws of Utah, specially provides that the directors shall do so. (Gary et al. vs. York Min. Co., 35 P. 495). Here the law-making power

creating a corporation especially directed that this particular power of the corporation shall be exercised through the directors. In Wisconsin, under the Wisconsin Act, the board of directors have no such power. In the case of Wells vs. Green Bay Co., 64 N. W., page 69, the Wisconsin Court discusses this question and reaches the conclusion as a general proposition of law that the levying of an assessment upon stock does not come within the general powers of the directors of a corporation.

The Utah case was decided upon a statute and the Wisconsin case states the general rule of law. The general rule is also stated in Thompson on Corporation, Section 8662, Vol. 7, as follows:

> "In the absence of special authority conferred upon them by law, or of the assent of the shareholders evidenced in some form, the directors of a corporation have no power to assess shares which have been fully paid up."

The question therefore recurs, what powers do the directors of a national bank possess, when interpreted by the National Banking Act? Because the authority of the directors must be found in this act, without the aid of any legislation of the various states creating corporations; and unaided by any other legislation of Congress unless it should be an act amendatory of the particular act in question. Plaintiff in error contended in lower court that if the assessment is to be levied by the shareholders, it could be done by a majority, while under Section 5220 liquidation must have a two-thirds vote of all the shareholders, and therfore a small minority could, in case they should refuse to levy the assessment, force the bank into liquidation. The answer to this is that a majority of the shareholders could make the levy if at a meeting of the stockholders,

who are the real owners of the bank, the assessment, after due consideration, was deemed advisable.

Plaintiff in error in the lower Court cited a number of cases which hold that the powers delegated to a corporation must be exercised by such agencies as the charter designates; hence if it were the duty of the directors under the National Banking Act to levy this assessment, the shareholders could not do so. (McCullough vs. Moss, 5 Denio, 575). It is common knowledge that in all large corporations the rule—rather than the exception—is, that a majority of the directors hold only a nominal number of shares of stock, yet if they should refuse to make an assessment the bank would be forced into liquidation even though a large majority of the stockholders should desire an assessment to be made. As above stated, if this power to levy this assessment is delegated by Congress to the board of directors, that delegation is exclusive, and an assessment could not be made by the shareholders. The converse of this proposition is true also, that if this power to assess is delegated by Congress to the shareholders, then it was not within the power of the directors to levy this assessment, and their attempt to do so is null and void.

It is not contended by respondents that the board of directors are prohibited from transacting all powers "necessary to carry on the business of banking," but it is claimed that the board of directors can only exercise those powers designated in the act, viz: by Sub-division 6-7 of Section 5136 and by Section 5145; which is to merely conduct the ordinary banking business. All other powers are to be exercised by the association itself, except where, by the terms of the act some other officer or officers are specially mentioned as the agent of the bank, for the performance of any par-

ticular specified duty. Attention is called to the fact that by the act, above specified, national banks are defined as "associations." The powers granted to these banks is granted to them under the name of "association." At Section 5133 it is provided that "associations for carrying on the business of banking under this chapter may be formed by any number of natural persons, not less in any case than five." These natural persons are authorized to adopt articles of incorporation "not inconsistent with law." Under Section 5136 it is provided "upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power" to do those things thereafter enumerated. Section 5140 provides that "at least fifty per centum of the capital stock of every association shall be paid in before it shall be authorized to commence business;" and further provides that the balance of the capital stock shall be paid in installments of not less than ten per cent per month thereafter, until the whole amount is paid. As heretofore stated, the name of this corporation in this statute is defined therein as "association," and these natural persons become an association by complying with the section above stated, and have power to sue and be sued before it is necessary to elect a board of directors. It is only necessary to elect a board of directors (Section 5145) "at any time before the association is authorized by the Comptroller of the Currency to commence the business of banking."

LANGUAGE OF SECTION 5205 DIRECTS THE LEVY UNDER THAT SECTION TO BE MADE BY THE SHAREHOLDERS AND NOT BY THE DIRECTORS.

The language of the above section is that—

"Every association whose capital stock shall have become impaired by losses or otherwise, shall within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of the capital stock held by each. * * * If any such association shall fail to pay up its capital stock and shall refuse to go into liquidation, as provided by law, three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of Section 5234."

Section 5220 is as follows:

"Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock."

Under the above Section 5205, the levy is not to be made by the directors nor is it to be paid by them. The language of the statute is that the association shall make the levy and it is further provided that "if any such association shall fail to pay, a receiver shall be appointed," etc.

It has been already stated that words used in a statute will be presumed to have the same meaning throughout the statute, and this is the rule when used in any subsequent statute, referring to the same subject matter, unless by the terms of the statute they are given a different meaning. It is also held that where the statute defines a word and gives its meaning that it will be presmued that that meaning adheres to the word wherever used unless by the terms of the statute another meaning is given to it.

Assuming this proposition to be correct, is it not a legitimate argument to say that the word "association" in this statute must

have the same meaning wherever used in this particular section? If so, applying it to the two directions or commands in the statute, viz: First, the "association" shall levy; second, the association shall pay, have we not here a command for the association to do two things? And is it a legitimate argument to say that when a command is given to levy, it refers to the directors; but when a second command is to pay, it refers to the shareholders? For it probably will not be disputed by the appellant that it was not incumbent upon the directors to pay this assessment after they had made the levy. But appellant does not take that position. It says to this Court that when the statute commands the "association" to levy an assessment, that it is a command to the directors; but when the command is to the "association" to pay, that that does not mean the directors, but refers to the shareholders. So, according to appellant's contention, the word "association" in the first instance means directors, and the very same word in the second instance means "shareholders."

Is it reasonable to suppose that Congress intended that so important a duty as making a levy under this statute and thereby creating a banking fund as a condition of continuing business, should be decided by the board of directors, most of whom are not interested financially but merely hold nominal shares of stock in order to qualify them to be directors? Is it not more reasonable that this important duty is intended by Congress to be addressed to the men who have to pay—the men who are really interested: the shareholders? Under this section "every association * * * * shall within three months after receiving notice thereof from the Comptroller pay the deficiency in the capital stock. * * * * If any such association shall fail to pay up its capital

stock * * * three months after receiving notice * * * a receiver shall be appointed." etc. Here there are three alternatives presented, none of which come within the ordinary "affairs" of the bank:

1st.—Shall an assessment be made on the shareholders?

2nd.—Shall no assessment be made, and the bank be allowed to lapse by limitation in three months?

3rd.—Shall the bank be put into immediate liquidation under Section 5220, which says: "Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock."

This alternative of making the assessment or go into liquidation is a matter of very great importance to the shareholders. In case the capital stock should be impaired, 100 per cent., it would be equivalent to creating a new bank. This impairment may have occurred by mismanagement of the affairs of the association of the bank by the directors. If so, should they be allowed to call upon the shareholders to rehabilitate the bank, so that their mismanagement should continue? Is it not apparent that this is a matter which addresses itself to the shareholders, the real owners of the bank, and is it not the right of every shareholder to have the shareholders called together in a meeting called for that purpose and have the affairs of the bank discussed, so that whatever action is taken may be as a result of the combined judgment of the shareholders, or at least a majority of them?

It is said in Section 706, Thompson on Corporations:

"It has been well said that the act of a *majority* of the corporators does not bind the *minority*, if it has not been ex-

pressed in the form pointed out by law; and accordingly, that the act of a majority expressed elsewhere than at a meeting of the stockholders, is not binding upon the corporation—as where the assent of each one is given separately and at different times. The reason is that each member has the right of *consultation* with the others, and that the minority has the right to be *heard*. In the line of authority establishing the foregoing principles, no break has been discovered; though it should be added that an election, or other proceedings had at a meeting irregularly assembled, may be valid if *all* attend and *act* or *assent*." See also Sections 3905-3908 inclusive.

I repeat that in the position taken by appellant, it is practically claimed that no deliberation of the real parties in interest was contemplated by the law-making power when provision for this assessment was provided for. Appellant's argument is, in effect, that while an alternative is presented to the owners of the bank to assess or go into liquidation, the real owners—shareholders—are only expected to consider one phase of this alternative, and even this has a limitation; because, if the board should refuse to make an assessment, the bank would have to close, so that in effect the board of directors decide both questions, assessment and liquidation. Appellant wants the Court to repeal Section 5220 of the Act, because, what use is that section, if the board of directors should decide against an assessment? Would not this close the bank? If the board of directors has a right to decide on the assessment, their decision either for or against it would be final. The right to decide this question could not be divided. It could not be decided by both the directors and the shareholders. Would not the directors, therefore, by deciding against the assessment, in reality pass upon both questions, assessment and liquidation? If they should decide not to assess, would not this close

the bank? What would be the object of the shareholders assembling to decide on the liquidation of the bank, when the directors had already decided, by refusing to assess, that the bank should go into liquidation? Again, if the directors should decide in favor of an assessment, what alternative would be left to the shareholders except to pay? When an assessment is made, there is no alternative; if the shareholder does not pay, his stock is sold, and he ceases to be a constituent member of the bank for the purpose of liquidation or otherwise, and thus the whole matter of assessment and liquidation is by the act of the board of directors removed from any consideration of the shareholders whatever.

Hulitt vs. Bell, 85 Fed. 98.

The Federal Court for the southern district of Ohio has construed this statute in the above case, and the conclusion there reached is adverse to appellant herein. In the above case two points are decided. The first is, that an assessment by the board of directors upon the shareholders, under Section 5205, is void. Second: That no action will lie in any event against the shareholder to recover the amount of the assessment, but the only remedy is the sale of the shareholder's stock. Both of these points are important in the discussion of the case at bar, for the reason that in deciding the second point, the Court makes it very clear that this assessment under the section above quoted, is not in any sense for the benefit of the creditors. The language of the judge is: "It may well be doubted whether the assessments provided for in Sections 5205 could be levied for the purpose of paying creditors," and if this be true it eliminates from this discussion the question of public policy in so far as it affects the creditors of the bank.

Delano vs. Butler, 118 U. S. 653.

The liability of a shareholder of a national bank to the creditors of the bank is independent of Section 5205 above quoted.

That liability is affected by Section 5151 and this Court has held that under that section (5151) a shareholder is liable, even though he has paid an assessment made under Section 5205.

Delano vs. Butler, 118 U. S. 634.

In other words, the shareholder's relation to his bank, under Section 5205, is entirely distinct and severable from his relation to the creditors of the bank under Section 5151. So that a shareholder might be assessed 100 per cent. a dozen times under Section 5205 and he might make a dozen payments, still, he would be liable in case of the failure of the bank to pay its creditors in his pro rata share of the debts up to 100 per cent. of his stock. Therefore, suppose the alternative is presented to either assess or go into liquidation, and if the directors can decide on the matter of assessment, the shareholder would be required to pay, and still if the bank should fail, he would be required to pay again in case the bank had not sufficient assets to pay its debts, and this, too, notwithstanding the fact that the law has given him, under Section 5205, the alternative of allowing the bank to be closed up, then if the assets do not meet the liabilities he would only be liable to the amount of 100 per cent. of his stock pro rata with the other stockholders.

In the case of Hulitt vs. Bell, the Court says: "They (referring to counsel for the defendant) claim that the language of the statute implies an election on the part of the association as to

the course it will adopt, and that this involves deliberation and the exercise of judgment on their part. My conclusion is that this claim is well founded and that it is essential to the validity of the assessment that it be made by the shareholders. * * * * The association is authorized under the 7th paragraph of Sec. 5136, 'to exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carrying on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits, by buying and selling exchange, coin and bullion, by lending money on personal security, and by obtaining, issuing and circulating notes according to the provisions of the statute.' The assessment in question does not fall within any of these powers; it does not come under the head of incidental powers necessary to carry on the business, nor is it included in the conduct of general business. It is a provision for a special emergency, so unusual and of such importance as to make it necessary for the association to consider and determine whether it will continue in business or wind up its affairs."

The language of the above case, in effect, holds that the word "association" as used in this section of the law, wherein the association is commanded to make an assessment, does not refer to the directors, and that the power of the corporation to make the assessment is delegated to the shareholders whose duty it is, in case the assessment is made, to pay the same.

It is no answer to this to say that this assessment may be made by a majority of the shareholders and in opposition to a minority thereof; because this is one of the conditions that every shareholder assents to when he subscribes for his stock. In order to make this

assessment binding upon him, however, he has the right to demand that all the shareholders associated with him in the bank shall meet in a meeting called for that purpose; that the matter shall be discussed; and that whatever conclusion is finally reached shall be the judgment of a majority of the shareholders, after the condition of the bank has been looked into, and all matters pertaining thereto have been duly considered. This decision of the shareholders is in the nature of a judicial investigation. It considers all conditions. Such a meeting would consider the causes of the impairment of capital; whether it was the fault of the directors or otherwise, and that every question of fault or cause of impairment would very largely affect ordinary business men in their action as to whether they should make the assessment or decide that the bank should go into liquidation and be closed up.

THE RIGHT TO ASSESS UNDER SECTION 5205 NOT A RESERVE FUND.

It was contended by plaintiff in error in the lower court that a shareholder in subscribing for his stock, by implication, consented to assessments under Section 5205, and that this assessment was for the purpose of a reserve fund which the shareholder could be called upon involuntarily to pay. That the power to compel this involuntary payment was vested in the directors. The answer to this is, that conceding Section 5205 is a covenant in the contract between the shareholder and the bank, the shareholder is not obligated beyond the covenant in the contract, i. e., the law. All that this law obligates the shareholder to do when notice is given of impairment of capital is to assess himself or to allow the corporation to go into liquidation and thereby lapse and terminate by limitation. It requires the shareholder to act, and the act to

be done is to exercise a choice as to which alternative he prefers. The law as a covenant in the contract does not require the shareholder to be assessed by somebody else. The assessment under Section 5205 is a voluntary assessment in contra-distinction to involuntary asesssment, as provided by Section 5151. If it be voluntary the alternative to assess or wind up the corporation is to the shareholder himself. It is the shareholder who is to act, and not the director. It was necessary for the shareholder to create a bank in order for the office of director to be created, and when the shareholders who create the bank see fit to terminate it, it terminates also the office of director, and therefore this power to assess under Section 5205 is in no sense a reserve fund that can be called upon by the directors of the bank. Any action taken by the directors concerning this assessment is absolutely void. The idea of plaintiff in error seems to be that this assessment is really but a "call" for something which the shareholders have promised absolutely to pay. The reply is that the shareholder has made no contract to pay, but has merely made a contract to do some alternative act, and that act is that he will at his own option either assess himself or allow the association to lapse by limitation, and this act is one which the shareholder himself is to do. It is a covenant in the contract of the shareholder. It is an act in personam. It is in no sense a covenant to which the director is a party. No action could be brought against a director in personam for the failure to comply with this contract. The only person that can be held is the party to the contract, and the party to the contract is the shareholder, and not the director. Therefore, the alternative is addressed to the shareholder, and not to the director. And this alternative gives the party to the contract, i. e., the shareholder, a choice of action. He is to pay or allow his bank to expire

by limitation. It is an alternative, and a party to a contract may always exercise an option as to which alternative of his contract he will take in performing same.

That this right to assess is not a reserve fund is apparent from the fact that there is no limitation upon the number of times the shareholders may be assessed under Section 5205. It is true that no one assessment could be greater than the face value of the stock, and it is also true that this assessment may occur as often as the capital is impaired. Therefore, suppose the capital in this bank had been impaired 100 per cent. instead of 50 per cent., and an assessment had been made to rehabilitate this capital. In that case the bank would continue to do business. But suppose the capital should be again impaired within six months or a year, then another assessment could be made. If the directors have the right to make this assessment they would also have the right to make a subsequent assessment upon notice that the capital was impaired, and the shareholder would have no remedy save and except to either pay his assessment or cease to be a stockholder in the bank. It is incredible that such power should be given to directors.

As said by Bean, C. J., in the opinion of this case (Weinhard Record, pages 50-51): "In our opinion, the language of the section plainly implies that, upon receiving such notice, the association may elect to either continue in business by increasing the amount of the investment, or go into voluntary or involuntary liquidation, and, as this question affects the shareholders alone, they, and not the directors, are entitled to determine the course that shall be pursued." * * * * If they desire and elect to continue in business they must make up the deficiency, but they are, in our

opinion, at liberty to take the other alternative and allow the corporation to go into liquidation."

BY WHOM VARIOUS POWERS OF NATIONAL BANKING ASSOCIATIONS MAY BE EXERCISED.

As previously stated, the only persons that may form a bank are "natural" persons, and in any case not less than five. Sec. 5133. In case it is desired to increase the capital stock of the bank this can only be done where it is provided for in the articles of incorporation. Sec. 5243 provides that the capital stock of an association may be reduced "by the vote of shareholders owning two-thirds of the capital stock." Sec. 5211 provides that an association shall make at least five reports to the Comptroller of the Currency each year, "Verified by the oath or affirmation of the president or cashier of said association and attested by the signature of at least three of the directors."

This is one of the things that the board of directors would not have power to do; but it must be done in the manner pointed out by the statute. So Sec. 5215 provides that an association shall make certain returns to the secretary or treasurer, but that it must be done through its president or cashier. Here is a duty that does not devolve upon the directors, and an act that the directors could not do. So that while Sec. 5145 provides: "The affairs of each association shall be managed by not less than five directors." The affairs of the association, here referred to, relate however, to the duties devolving upon the directors under Sec. 5136, hereinbefore referred to, and in any event are merely the ordinary control of the property of the bank—the funds or the assets thereof—and the conducting of the ordinary business which the bank is authorized to conduct, with its funds, assets and property, in the carrying

10593

out of the business for which the bank was organized. All other duties must be done by the shareholders.

ANALYSIS OF SOME OF APPELLANT'S CASES.

To sustain appellant's contention, counsel in the lower court cited a number of cases, and while it is not intended to review each of them, it is purposed to review each class, in so far, at least, as they are cited in reference to the powers of the board of directors. In Budd vs. Multnomah Street Ry., 15 Oregon, 413, the Court held that the directors had power under the Oregon Statute to make a "call" for an unpaid subscription of stock. This is merely another way of saying that it is within the power of directors to provide for the collection of money which by contract the shareholder has promised to pay to the corporation. It is in no sense a creation of a new fund, but is merely the collecting in of a fund subscribed by the stockholder in order that the purposes for which the corporation is formed may be carried out. Apropos of this discussion, however, it may be well to call attention to the peculiar language of the Oregon Code with reference to directors. The Oregon Statute, which is the basis of all powers in corporations organized within the state, at Section 3225, Hills' Annotated Code, provides "that from the first meeting of the directors, the 'powers' vested in the corporation are exercised by them, or by their officers or agents under their direction, except as otherwise specially provided in this chapter." Compare this with the National Banking Act, and especially Section 5145, which says: "The affairs of each association shall be managed by not less than five directors," and then by reference to Section 5136 of this act, it will be seen that the language is very different in the grant of powers to directors by the Oregon Code. In the National Bank-

ing Act the "affairs" of the bank are to be conducted by the directors and these affairs are specially enumerated in Sub-division 6-7 of Section 5136. But in the Oregon Code, the "powers vested in the corporation" are to be exercised by the board of directors. It would not be profitable to speculate on the full scope of this provision of the Oregon law, but in any event it is certain that whatever powers a corporation has, shall be exercised by the board of directors "except as otherwise provided in this chapter." It is clear, however, that the powers granted to directors under this peculiar statute of Oregon cannot be attributed by analogy to those granted to the board of directors under the National Banking Act, which latter act prescribes the duties of directors in a much more limited language than that used in the Oregon Act.

McCullough vs. Moss, 5 Denio, 575.

In this case it was held under a special act incorporating a company, where, by its charter, the board of directors were invested "with the power to manage the concerns of a corporation" that a resolution of the stockholders, without the action of the board, could not bind the corporation on a note made by the officers of the company. The Court holding that under the above language defining the duties of the board of directors, the ordinary management of the corporation in the transaction of its ordinary business was reposed in the directors and that the signing of a note in the ordinary course of business came within the scope of the duties to be performed by the directors and very properly held that the management of the "affairs" of the bank could not be divided, and therefore held that those powers which are to be performed by the board of directors could not also be performed by the shareholders.

10594

In re. Excelsior Ins. Co., 38 Barbour, 297.

In this case by special act an insurance company was incorporated with 40 directors. Subsequently thereto an amendatory act was passed reducing the directory from 40 directors to 21 directors. It was held that the power of reducing the directory to 21 members, under an amendatory act, was in the directory itself, and where this duty was undertaken to be performed by the stockholders and in pursuance thereof only 21 of the directors were elected, the Court would not hold such election illegal and set same aside. The 21 directors being a majority of the board and therefore capable of transacting business. This case merely interprets the particular charter, and the division of powers thereunder.

Hutchinson vs. Greene, 91 Mo. 367.

This case merely holds that under a statute creating corporations which provided that "the property or business of the corporation shall be conducted and managed by the directors." It was within the power of the board to use the property of the corporation to pay its debts, and therefore in pursuance of this duty when a corporation became insolvent, that it was within the power of the board to make an assignment for the benefit of the creditors. It would seem to be too plain for argument that where the affairs of a corporation are in the hands of a board of directors whose duty it is to conduct same, that one of the first duties which the board owes to the public is the payment of the corporate debts, and the board would have the right to use the property of the corporation, whether it was solvent or insolvent, for that purpose. But where the corporation was insolvent, as in the case above quoted, it was not only within the powers of the board of directors, but its duty, to make an assignment for the benefit of the creditors,

to the end that each creditor should receive his pro rata share of the assets. Many of the cases cited by counsel for appellant are cases holding that the board of directors have authority to make assignments for the benefit of creditors, but the assignment for the benefit of creditors is a very different affair than the creating of a fund for the purpose of conducting the business of a banking corporation whose charter had expired by limitation and where it was necessary to create a new fund in order to extend the life of the bank.

Louisville Trust Co. vs. Louisville Ry., 75 Fed. 448.

This case holds that where a statute allowed a corporation to "guarantee bonds upon the petition of the holders of a majority of the stock of said railway company," and where the board of directors had guaranteed negotiable bonds without a petition of the stockholders and these bonds had passed into the hands of an innocent holder, the innocent holder was entitled to enforce payment thereof against the guaranteeing corporation, notwithstanding the irregularity in the manner of the guarantee. The doctrine of this case therefore is, that where a corporation has the power to guarantee negotiable bonds, an innocent purchaser thereof may rely upon the presumption that in the exercise of that power the corporation has done the same in the manner required by its charter. In Oregon this presumption would probably follow as a matter of statutory enactment. Code. Sec. 776, Sub-division 15-19-20.

It will be seen by investigation of these cases cited by counsel that the Courts, in construing the powers of a corporation or the manner of the exercise thereof, follow the provisions of a particular charter under consideration. In fact, no corporation case can

10595

be found where this is not the rule, because all corporations are either the result of special acts creating them or of general acts defining their powers. It is contended here by appellant that the National Banking Act gave the board of directors the power to make this assessment. This is equivalent to saying that it is within the power of the directors to enlarge the fund of the bank and thereby change the status of the stockholder by placing his stock upon a different basis than that assumed by him when he made his subscription. It takes away from the shareholder all alternative as to whether or not when the capital of the national bank is impaired it is advisable to repair the capital or go into liquidation.

The contention of respondents is that under Section 5205 of the National Banking Act the board of directors have no authority or power to make an assessment on the stock of the shareholder and the attempt in this case to do so, was null and void. That the action of the bank in selling respondents' stock was a conversion thereof for which the appellant is liable, and the decision of the Supreme Court to that effect is right and should be affirmed.

Respectfully submitted,

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